APPENDIX A

1. The Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. § 717, *et seq.*, provides in pertinent part:

> Section 4(c). Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.
>
> Section 4(d). Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [52 Stat. 822 (1938), 15 U.S.C. § 717c]

Section 5(a). Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938), 15 U.S.C. § 717d]

* * * * * * * * *

Section 7(c). No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public conven-

ience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942), 15 U.S.C. § 717f(c)]

* * * * * * * * *

Section 7(e). Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)].

* * * * * * * * *

APPENDIX B

(Opinion and Judgment of the Superior Court of the State of Delaware in and for New Castle County)

No. 58, 1962

CITIES SERVICE GAS COMPANY

v.

WESTERN NATURAL GAS COMPANY

MEMORANDUM OF DECISION

(May 24, 1960)

On cross motions for summary judgment and defendant's motions to dismiss all of or a portion of the complaint.

John J. Morris, Jr. and Howard L. Williams (Morris, James, Hitchens & Williams) Attorneys for Plaintiff; Conrad C. Mount, Joe Rolston, Gordon J. Quilter and Robert R. McCracken, all of Oklahoma City, Oklahoma, of counsel.

Clair John Killoran (Killoran & VanBrunt) Attorney for Defendant; George D. Horning, Jr. and Patrick G. Sullivan (Hogan & Hartson) both of Washington, D.C.; and John C. Dawson (Liddell, Austin, Dawson & Huggins) Houston, Texas, of counsel.

CHRISTIE, J.:

Many of the facts in this case are substantially similar to those in *Cities Service Gas Company* v. *Columbian Fuel Corporation,* as recited in Storey , 155 A.2d 879, and in the related Supreme Court case at Storey , 158 A.2d 478 (application for certiorari now pending in the United States Supreme Court). A new recital of the facts will not be made here

although new or different factual matter has been considered and will be touched upon herein.

One of the differences between this case and the cases cited above is that here defendant has filed a counterclaim based on plaintiff's failure to pay amounts alleged to be due under defendant's "filed rate theory" since December 23, 1957. The counterclaim is not separately discussed in this memorandum since the decision on the merits of the original claim effectively disposes thereof.

I

Defendants motions are based largely on the following grounds:

(1) *Lack of jurisdiction in this Court.* This matter has been decided by the Delaware Supreme Court in *Columbian Fuel Corp., etc.* v. *Superior Court, etc. and Cities Service Gas Company,* Storey , 158 A.2d 478 (1960).

(2) *Failure of plaintiff to exhaust its administrative remedies.* Although this argument may not have been developed in the prior cases, nevertheless, I find it to have no merit in view of the rulings of this Court and the Supreme Court referred to above. No administrative remedy exists before the Federal Power Commission for the recovery of the money here sought. Since this Court does have jurisdiction and the Federal Power Commission does not have jurisdiction as to the remedy here sought, the rule that the parties must exhaust their administrative remedies finds no application here. Although the F.P.C. might, in its discretion, render a declaratory order or some other decision which might have an important bearing on some of the issues in this case, such possibility does not amount to an administrative

remedy which precludes plaintiff from seeking a complete remedy in this Court.

(3) *A part of plaintiff's claim is barred by the statute of limitations.* This argument is new in this case and will be dealt with herein.

The action was filed June 16, 1958. In this action, plaintiff seeks refunds for payments made by it for a period from January 1, 1954 to December 22, 1957. If the three year statute of limitations is applicable then that portion of the action which accrued prior to June 16, 1955 is barred.

The Delaware statute of limitations reads as follows:

"*Actions subject to the three-year limitation*

"No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action . . ." (10 Delaware Code § 8106)

Another section provides that where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply. 10 Del. Code § 8120. Plaintiff as a Delaware corporation is a resident of this State.

Statutes of limitations begin to run when proper parties are in existence capable of suing and being sued, and a

cause of action exists capable of being sued on forthwith. *Keller* v. *Farmers Bank of State of Delaware,* 2 Terry 471, 24 A.2d 539 (Superior Ct., 1942). The parties do not disagree with this basic rule. A dispute arises from differing views as to the date on which the cause of action accrued or came into existence.

Defendant maintains that plaintiff's causes of action accrued as to each payment at the time the alleged overpayments was made. Thus, defendant insists that all claims based on payments made more than three years before June 16, 1958 are barred.

Plaintiff, on the other hand, maintains that the action did not accrue until January 20, 1958, when the United States Supreme Court declared the Kansas price order invalid. If plaintiff's contention is correct, then no part of the claim is barred by the statute.

Defendant points out that the minimum price order was not directly applicable to plaintiff and argues plaintiff could have simply refused to pay the price required under such order, since it applied to producers and not to purchasers. Thus, says defendant, there was no mandatory requirement for Cities to challenge the validity of the order before instituting an action for restitution and there was no restraint preventing Cities from instituting the action as soon as an alleged overpayment was made. It is argued that since nothing prevented plaintiff from suing as soon as the first payment was made, the statute of limitations began to run.

The case most nearly on point is *Natural Gas Pipeline Co. of America* v. *Harrington,* 139 F. Supp. 452, 461 (N.D. Texas 1956) affirmed 246 F.2d 915, 921 (5th Cir. 1957). The facts in that case were substantially similar to those of the case at bar. The District Court there held that the cause of action did not arise until the final determination

of the invalidity of a minimum price order similar to the order here involved. The Circuit Court affirmed the decision and adopted the same view as to when the cause of action arose.

It has often been held that a statute of limitations does not begin to run as to an action for restitution until the erroneous judgment or decree under which the money was paid is reversed. *Simmons* v. *Simmons,* 91 W.Va. 32, 112 S.E. 189 (1922); *Hudson's Estate* v. *Evans,* 11 S.W.2d 825 (Tex. 1928); *Kurn* v. *Pittsburgh Plate Glass Co.,* 48 F. Supp. 574 (D.C. Mo. 1942); *Restatement, Restitution* § 74. See also *Morford* v. *Bellanca Aircraft Corporation,* 6 Terry 129, 67 A.2d 542, 547 (Superior Ct. 1949) and *Abramson* v. *Delrose, Inc.,* 132 F.Supp. 440 (D.C. Del. 1955).

On the other hand, defendant cites a number of cases where the statute of limitations has been held to run from the time of an erroneous payment and not from the time that the right to recovery was established. *Brink* v. *Kansas City,* 358 Mo. 845, 217 S.W.2d 507 (1949) (an invalid tax assessment); *Washington Sec. Co.* v. *State,* 9 Wash. 2d 197, 114 P.2d 965 (1941) (an overpayment to the state for land); *Broadwell* v. *Board of Comm'rs.,* 88 Okla. 147, 211 Pac. 1040 (1922) (taxes paid on non-taxable land); *Ball* v. *United States,* 137 F.Supp. 740 (1st Cir.) cert. denied 352 U.S. 827 (1956) (suit for back pay after a District Court had determined that a serviceman had been improperly reduced in rank).

Although it may be true that the minimum price order did not apply directly to plaintiff, defendant attaches an unwarranted legal significance to this fact. A realistic appraisal of the legal situation as it existed prior to the United States Supreme Court's decision rendered Janu-

ary 20, 1958 indicates that plaintiff was under a legal obligation, if it wished to purchase the gas, to pay the rates specified in the order.

Plaintiff would have been a party to a violation of state law if it had purchased the gas at rates lower than those specified in the price order. Plaintiff had an apparent duty to comply with state law and regulations promulgated thereunder until such law was changed or declared invalid. Under the circumstances, I find the authorities cited by plaintiff state the rules of law which should be applied in the case at bar. Because the minimum price order prevented the recovery plaintiff seeks, no right of action, which was capable of being sued on forthwith, existed in plaintiff before January 20, 1958.

The minimum price order in this case was a sweeping substantive regulation going far beyond the realm of mere administrative or procedural detail. In many respects it had the effect of a statute. A void regulation of general application which has the effect of a statute is roughly equivalent to an erroneous holding by a judicial body insofar as the period of limitations is concerned. The right to recover funds paid on account of the erroneous judicial decision or the void statute depends upon a change in what then appears to be the applicable law. The need to change the apparently applicable law in cases such as these is in contrast with the need to correct an error which does not involve a change in the law. In cases such as the one before the Court, a right of action does not accrue until the law which forbids the recovery is declared void. On the other hand and in the case of erroneous administrative acts such as the collection of taxes not due, payment for land already owned or unauthorized demotion of military personnel, the right to recovery depends not upon a change in the apparently applicable

law but rather upon making a proper showing under the existing law. In those cases the period of limitations is often measured from the date of the error.

I find that the approach outlined above has many defects and tends to explain only part of the apparent conflict between the rules laid down in some of the authorities cited by the parties. However, under the peculiar circumstances of the case at bar, it is clear that the right of action for restitution did not accrue until January 20, 1958 and I so hold. To the extent that the authorities cited by defendant tend to indicate a different holding, I decline to follow them.

The above discussion of the period of limitations applies to the restitution phase of this case. Plaintiff also seeks to recover on the theory of an express contract, which plaintiff says came into existence when defendant accepted the increased payments subject to the reservations noted in plaintiff's letters dated August 25, 1953 and January 21, 1954. If an express contract exists, it is clear by the terms thereof that action thereon is not barred by the period of limitations.

II

Plaintiff's motion for summary judgment is based on voluminous record already compiled by pre-trial procedures in this case. The pertinent facts are not in dispute. Except for the obvious differences in amounts of gas delivered, the contract prices and the amounts claimed, the pertinent legally significant facts are substantially similar to the facts outlined in the *Columbian* case.

The issues raised by this motion were discussed in the dicta contained in the opinion in the *Columbian Fuel Corp.* case, *supra*. The argument in this case was made before

the decision in the *Columbian* case was rendered, and the briefs in both cases were before me before the first decision. The decision as to jurisdiction in the *Columbian* case was affirmed by the Delaware Supreme Court (158 A.2d 478). Since the review by the Supreme Court was on petition for writ of prohibition, there was no review of the merits of that decision. Furthermore, this Court has not yet addressed itself to plaintiff's motion for summary judgment in the *Columbian* case.

However, I continue to be of the opinion that my earlier opinion and the dicta contained therein correctly state the law as it applies to the *Columbian* case and the case at bar. Since this Court's decision was rendered, similar conclusions were reached in a similar case in the United States District Court for the District of Nebraska, after a careful consideration of most of the arguments here raised. *Kansas-Nebraska Natural Gas Co.* v. *Pan American Petroleum Corp.*, an unreported oral decision by Judge Robert Van Pelt.

A number of other issues were raised in the pleadings at argument which have not been specifically discussed in this memorandum or the prior decision. These issues are resolved so as to be consistent with the decision herein announced.

I find that the pleadings state a cause of action for restitution and the undisputed facts support the essential allegations of the pleadings. Therefore, plaintiff is entitled to the restitution it here seeks.

Defendant's motion will be denied. Plaintiff's motion for summary judgment in its favor is granted as to the original claim and as to the counterclaim.

Order and Final Judgment

AND NOW TO WIT this 25th day of June, 1962, each of the parties hereto having moved for summary judgment, and the defendant having filed motions for reargument on June 3, 1960, and May 17, 1962, and the matters having been briefed and argued, and the Court having rendered its Memoranda of Decision dated May 24, 1960, June 20, 1960 and May 11, 1962, and its Letter Opinion of May 25, 1962, it is

ORDERED, that defendant's motion for summary judgment is denied; and it is

FURTHER ORDERED, that the defendant's motions for reargument are denied; and it is

FURTHER ORDERED, that plaintiff's motion for summary judgment is granted and judgment is hereby entered for plaintiff against defendant for the sum of $1,264,826.89 with simple interest thereon at the rate of six (6) percentum per annum from January 20, 1958, plus the costs of this action.

/s/ ANDREW D. CHRISTIE
Judge

APPENDIX C

(Opinion and Judgment of the Supreme Court of Delaware)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 58, 1962

WESTERN NATURAL GAS COMPANY, Appellant,

vs.

CITIES SERVICE GAS COMPANY, Appellee.

(May 21, 1964)

Terry, Chief Justice, and Wolcott and Carey, JJ., sitting.

Appeal from summary judgment for plaintiff entered in the Superior Court of New Castle County.

Clair J. Killoran and Courtney H. Cummings, Jr., of Killoran and Van Brunt, of Wilmington, and Hogan & Hartson, of Washington, D. C., and John C. Dawson, of Liddell, Austin, Dawson & Sapp, of Houston, Texas, and J. Colin Lizotte, of Enright & Lizotte, of Milford, New Hampshire, for appellant.

Howard L. Williams and Henry N. Herndon, Jr., of Morris, James, Hitchens and Williams, of Wilmington, and C. C. Mount and Charles V. Wheeler, of Oklahoma City, for appellee.

Carey, J. (for a majority of the court):

The defendant below has appealed from an order of the Superior Court granting summary judgment to the appellee. Cities Service Gas Company (Cities) operates an interstate pipe line company and Western Natural Gas Company (Western) is a producer of natural gas. The action was brought to recover alleged overpayments for natural gas purchased by Cities from Western from Janu-

ary 1, 1954 to January 1958. The matter is now before this Court on motions of both parties for reargument. This Court previously filed majority and dissenting opinions, but the petitions for reargument were granted. Following this, the former Chief Justice left the bench and the reargument therefore covered all phases of the case. Because we have concluded to withdraw the prior opinions, it is necessary to discuss the matter in full.

Two earlier cases involving these overpayment actions have been passed upon by this Court. See Columbian Fuel Corporation and Pan-American Petroleum Corporation v. Superior Court, 52 Del. 365, 158 A. 2d 478; aff'd. 366 U.S. 656, 81 S. Ct. 1303, 6 L. Ed. 2d 584; Helmerich & Payne v. Colorado Interstate Gas Company, ... Del. ....., 187 A. 2d 67.

The background of this case and many of the pertinent facts giving rise to the action are to a great extent the same as in the first cited case, which involved a similar suit for overpayments brought by Cities in the Superior Court. For a discussion of the Kansas minimum price order effective January 1, 1954, Cities' letters of protest to its suppliers of gas and payments for gas at the rate fixed by the order, Cities attack on the Kansas order, and the final voiding of the order on January 20, 1958 by the Supreme Court of the United States, see the opinion in the Columbian case, supra. Cities' protest letter to Western appears to be identical with that sent to Columbian and Pan-American. We see no reason to repeat these matters in this opinion.

In this case, as in the former cases, the producer, after the Federal Power Commission had assumed jurisdiction in June 1954, filed a copy of the contract and the Kansas price order with the Commission to establish the rate for gas between the parties. A copy of the protest letter was not filed.

The present case raises issues not directly involved in the Columbian case, which presented primarily the question of the jurisdiction of a state court to entertain the suits for refunds. That jurisdiction was upheld, but the merits, i.e., the right to recover, were not involved. See 366 U.S. 656, 81 S. Ct. 1303.

In granting summary judgment to Cities, the trial Judge held:

1. The pleadings state a good cause of action for restitution, and the undisputed facts support the pleadings.

2. Plaintiff has no administrative remedy.

3. Plaintiff is entitled to interest from the date the Kansas order was declared invalid.

4. The statute of limitations does not bar the action.

All of these holdings are challenged by Western.

The contract between the parties set a price of 8¢ per M. C. F. but it contained the following clause:

> "This agreement is subject to all present and future laws and valid orders, rules and regulations of any regulatory body having jurisdiction."

The contract price could, therefore, be changed by mutual agreement, or by promulgation of a valid regulation by a governmental authority having jurisdiction to do so. Had the Kansas regulation been valid, the result would have been an automatic increase in the contract rate to 11¢. Being invalid and void ab initio, the regulation itself in fact made no change in that contract price. Prior to June 1954, when the Federal Power Commission first asserted jurisdiction, there is no basis for saying that Cities was contractually bound to pay 11¢.

Western contends, however, that the legally effective rate became 11¢ commencing in June 1954 when the Federal Power Commission first asserted jurisdiction, wherefore Western argues that a state court has no power to change it retroactively by ordering repayments.

This argument was dealt with in the Columbian case, supra, wherein this Court cited several Federal decisions. To them may be added Pan-American Petroleum Corporation v. Kansas-Nebraska Natural Gas Company, Inc., 8 Cir., 297 F. 2d 561. It was held that the Natural Gas Act is not inconsistent with reimbursement for overpayments, because the Kansas order was void ab initio and the contract rate controlled.

Western makes another contention which concerns not only the matter of the effective rate, but also the power of a state court to decide the matter. This argument is based on two proceedings before the Federal Power Commission.

The first proceeding was originated by a complaint filed on August 31, 1955 by Tennessee Public Service Commission and others with respect to rates charged by Western. Thereupon, the Commission instituted an investigation into all the rates charged or collected by Western. It held a number of hearings. Cities did not seek to intervene. On December 31, 1959, the presiding examiner made a finding that Western's rates had not been shown to be unjust. He also stated that dismissal of the complaint would have the effect of determinating that the existing rates would be continued. As the 11¢ rate was one of those under consideration, Western now contends that the Commission in fact adjudicated the rate. The answer to this suggestion is that the Commission itself modified the Examiner's findings. Its final order expressly held that it was making no

determination as to whether Western's individual rates were just and reasonable, that its dismissal of the complaint was not a determination that the existing rates should be continued, that it did not adopt the examiner's finding to the effect that none of those rates had been shown to be unjust or unreasonable. Moreover, it expressly directed that its order was not to be construed as a determination of what the effective legal rates are or have been for jurisdictional sales by Western.

In another proceeding before the Commission, Western complained against Cities for failure to pay the 11¢ rate, Cities having ceased to pay it after the Kansas regulation was declared void. Later Western requested that this proceeding be consolidated with another matter pending before the Commission. The Commission denied the application to consolidate, holding inter alia, as follows:

> "Since litigation is now pending between the parties concerning the lawful rate for the sale and purchase of gas, it is neither necessary, appropriate, nor in the public interest for the Commission at this time to undertake to determine the rates for those sales . . . ."

This language appears to amount to a disclaimer of jurisdiction over the dispute now before us.

In a separate proceeding, the Commission had before it a proposal to amend its rules so as to provide for the rejection of any tender for filing to the extent that the filing was based on a State-prescribed minimum price. This proceeding was initiated on April 28, 1958 and early in 1962 the Commission decided to terminate that proceeding, stating that "at this late date a rule making proceeding would be a cumbersome and inappropriate means by which to exercise our jurisdiction over the matters involved here . . . . We recognize, moreover, that a buyer of

natural gas who has paid seller on the basis of a State minimum price law can invoke the jurisdiction of an appropriate Court in the event that his contract provides for a refund if the State minimum price laws are held invalid".

The foregoing language seems to emphasize that the Commission has disclaimed jurisdiction over the subject matter of refund litigation growing out of rate filings based on State minimum price orders, or, at least has recognized the existence of such jurisdiction in State Courts.

We are accordingly of the opinion that nothing done by the Commission has altered the contract rate or fixed a minimum price of 11¢ for the period within which we are concerned. We also continue to be of the opinion that our Superior Court has jurisdiction to determine this matter.

The net result is that neither the invalid Kansas regulation nor any action of the Federal Power Commission made any change in the price of 8¢ which was accordingly the *effective* rate throughout the pertinent period. It follows that, had Cities paid only 8¢, Western would have no valid ground to sue for the excess. Of course, Cities did pay 11¢ up to the time of the Supreme Court decision, and the question is whether it may now recover the excess.

The complaint, as amended, contains three theories: (1) Cities protest letter of January 21st, 1954, followed by the notations on the monthly checks specifically referring to that letter and the acceptance of those checks by Western, constituted an agreement on the part of Western to refund the excess if and when the regulation was declared invalid; (2) the excess was paid by Cities because of business compulsion or duress and Cities is therefore entitled to restitution; (3) the excess was paid involuntarily and Western

was unjustly enriched thereby, wherefore Cities is entitled to restitution. The Court below held that a case for restitution was shown by the uncontradicted evidence in the record, and it declined to rule on the "contract" theory. Because that contention was not decided by the trial court and was not raised before us until the petition for reargument, we prefer not to decide it at this stage. The question we must pass upon is whether the undisputed evidence — consisting of affidavits, answers to request for admissions and certain allegations in the complaint admitted by the answer — justifies entry of summary judgment for Cities.

The ruling of the Court below is challenged by Western on several grounds: (1) the record does not justify a finding of business compulsion and there should at least be a trial before its existence can be determined; (2) payment of the excess was a voluntary one which can not be recovered, or, at least, it cannot be held involuntary without further proof; (3) the excess was paid by mistake of law for which no recovery may be had; (4) there has been no unjust enrichment because Cities was reimbursed by an increase in the rates paid by its customers and has therefore lost nothing; (5) the action is barred by the statute of limitations.

Although in the arguments before us much stress has been laid upon the theory of business compulsion or duress, that theory of recovery is not even mentioned in any of the opinions of the lower Court. At one point, in discussing the propriety of summary judgment, that Court refers to its prior holding in Cities Service Gas Co. v. Columbian Fuel Corp., 2 Storey 262, 52 Del. 262, 155 A. 2d 879, as being dispositive of many of the arguments made in this case. As we read the Columbian opinion, aside from the matter of jurisdiction, it deals primarily with a determination of the true "filed" or effective rate, counsel having conceded that

Columbian could not retain any money paid in excess thereof. No determination was made as to the existence of duress. In the present case, we have no such concession.

At another point in the opinion below, however, in dealing with the statute of limitations, the Court cites and relies upon decisions which allowed recovery of money paid under a judgment or decree which is subsequently reversed. See Restatement, Restitution Sec. 74. It points out the analogy between payments made by reason of such a reversed judgment and those made under a statute or substantive administrative regulation held to be void.

We are, accordingly, not certain as to just what was the true basis of the Court's finding, although clearly it was not predicated upon a contract to repay.

Of course, payment voluntarily made with full knowledge of the facts cannot be recovered, in the absence of a contract to repay. 40 Am. Jur. 822. A payment under protest is not necessarily involuntary, nor is it made so by unilaterally calling it involuntary at the time of payment; Natural Gas Pipeline Co. of America v. Harrington, 5 Cir., 246 F. 2d 915; Monaghan v. Lewis, 5 Penn. 218, 225, 59 A. 948; 40 Am. Jur. 820; but where money is paid because of duress, the payment is involuntary. The question is basically one of fact, although undisputed facts may justify summary judgment.

The plaintiff here maintains that the undisputed facts in the record require the finding of involuntariness by reason of duress. It contends that it was forced to pay the higher charge by the Kansas statute which carried criminal sanctions. These are cases holding that payments required to be made by an administrative order are similar in effect to those made pursuant to a judgment, the order constituting sufficient compulsion to render the

payment involuntary. Restitution has been ordered in such cases when the administrative order was declared invalid. 2 Am. Jur. 2d 676. In every instance we have seen of this type, however, the order was clearly applicable to both payor and payee. Here, the Kansas Supreme Court held, in Cities Service Gas Co. v. State Corporation Commission, 180 Kan. 454, 304 P. 2d. 528, that the order (therefore, presumably, the criminal sanctions) applied only to the seller. It is not suggested that Cities was motivated by the desire to protect Western against those sanctions. In other words, the order did not require Cities to pay, although it required Western to collect. Cities was mistaken if it believed that the statute was applicable to it, and this mistake was one of law for which restitution does not lie. The distinction we are now making is not a mere play upon words. The point is that the order did not force Cities to do anything.

It seems to us that plaintiff is thus obliged to fall back upon the theory of business duress, if there was no contract to refund. We do not have before us a finding of fact made after a hearing of testimony or upon a stipulation of facts; what we do have is a summary judgment, which may be entered only when there is no dispute of material fact and only one inference is justified. As applied here, to determine the propriety of the judgment below, we must decide whether the only reasonable conclusion is that Cities was compelled by duress to make the higher payments in order to meet its needs for gas.

In order to recover under the doctrine of business duress, Cities must, of course, demonstrate the actual existence of duress, as well as the likelihood that serious harm would occur to its business if it did not pay the increase. 17 Am. Jur. § 7. In charging duress in this case, Cities relies

heavily upon the Harrington case, supra. There, perhaps, an actual threat was made by the supplier to discontinue deliveries if the new rate was not paid; at least, the Court found that the buyer was justified in considering certain statements to be such a threat. See D.C., 139 F. Supp. 452. The present record contains nothing to show that Western made any threat or did anything else to force Cities to pay the higher price. In fact, § 7(b) of the Natural Gas Act prohibits a supplier from discontinuing service without permission of the Federal Power Commission. In short, the record does not establish what action Western would have taken had Cities refused to pay the higher price. We have already discussed the claim of duress arising from the Kansas regulation, and no other event or action constituting duress has been suggested.

In the second place, the record is insufficient to establish definitely a compelling necessity for Cities to continue purchasing from Western.

At the present stage, we cannot determine what additional evidence is required; we simply hold that the present record does not necessarily lead exclusively to the inference of involuntary payment by Cities. The record fails to establish duress; it also fails to establish that Cities was in imminent danger of suffering immediate and substantial economic injury as a result of any duress.

Two other defenses raised by Western will be mentioned. It points out that Cities received higher rates from its customers and concludes that it has sustained no loss. The real losers are Cities' customers and at least as to the "jurisdictional" customers, Cities is required by an order of the Federal Power Commission to refund to them any amounts recovered here. To this extent, certainly, we think that this argument constitutes no defense. The statute of limitations would not bar a recovery if business duress is

proven or it is to be ultimately determined that there was a contract to refund. Cf. Helmerich & Payne v. Colorado Interstate Gas Company, supra.

We do not foreclose Cities from reasserting its "contract" argument in the Court below. Because we cannot predict the ultimate conclusion of the trial Court as to either theory, we think it inadvisable at this time to determine the other questions raised, such as the amount of recovery, if any, and the matter of interest.

The prior opinions are withdrawn, and the decision of the Court below is reversed with directions to proceed in accordance herewith.

WOLCOTT, J. (dissenting):

I dissent from the conclusion reached by the majority that this case must be remanded for further proceedings. I would affirm the judgment below because, in my opinion, the record contains sufficient to demonstrate that Cities paid Western the 11¢ rate for gas under business compulsion, which therefore makes the payment of the excess involuntary on the part of Cities. The majority takes the view that the record is incomplete in this respect. I disagree.

When the Kansas order fixing the price at 11¢ was first promulgated it applied on its face to all who "take gas or cause gas to be taken" from the Hugoton Field. It seems plain, therefore, that until December 8, 1956, when the Supreme Court of Kansas in an attempt to save the order "construed" it to apply only to producers, 180 Kan. 454, 304 P. 2d 528, Cities was justified in thinking the order applicable to it and that a violation by it would have subjected it to criminal sanctions. Thus, it seems proper to me to conclude that from January 1, 1954 to December 8,

1956, at least, Cities was paying the additional 3¢ under the compulsion of fear of the criminal sanctions of the order, in part at least.

But of more importance in this respect is the fact that Western admittedly would have been subjected to the criminal sanctions of the order if it had sold gas to Cities at less than the 11¢ rate. Cities had to have the gas to supply its customers. It could obtain that gas from the Hugoton Field only by purchasing at 11¢ from Western to which it was bound by contract. Under the circumstances, Cities took the only reasonable course — it paid under protest and took steps to invalidate the order.

The majority says that the record is silent as to whether or not Western would have refused delivery to Cities if tendered the 8¢ contract price. If such was the fact, that is, if Western would have delivered for 8¢ and thus have deliberately flouted the Kansas order, admittedly applicable to it, that fact should have been made to appear affirmatively in the record by Western. It does not appear, and it does not seem reasonable to assume that Western would have had such little regard for the laws of Kansas within whose boundaries it was producing natural gas.

The majority says that Cities has made no showing that it could not have acquired the necessary gas from other sources, or from its own reserves. Why should it be required to make such a showing? It had a contract with Western to supply its needs. To this contract both were bound.

I think this case is similar to *Natural Gas Pipeline Co. of America* v. *Harrington,* 246 F. 2d 915, which should lead this Court to affirm the judgment below.

Mandate

THE SUPREME COURT OF THE STATE OF DELAWARE

To the Honorable the Judges of The Superior Court of the State of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

C.A. No. 674, 1958

CITIES SERVICE GAS COMPANY

v.

WESTERN NATURAL GAS COMPANY

a certain judgment or order was entered on the 25th day of June 1962, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on May 21, 1964, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby reversed, with costs, hereby taxed in the sum of Twelve Dollars No Cents — Dollars ($12.00) to be recovered by Western Natural Gas Company against Cities Service Gas Company, with right of execution; and the said cause is hereby remanded with instructions to take such further proceedings therein as may be necessary in conformity with the opinion of this Court.

WITNESS The Honorable Charles L. Terry, Jr., our Chief Justice at Dover, the first day of January, A.D. 1964.

Issued June 5, 1964.

E. TOWNSEND, JR.
Clerk of the Supreme Court

APPENDIX D

(Opinion and Judgment of the Superior Court of the State of Delaware in and for New Castle County.)

MEMORANDUM
(December 10, 1965)

Howard L. Williams, Esquire and Henry N. Herndon, Jr., Esquire, of the firm of Morris, James, Hitchens and Williams, Wilmington, Delaware, Conrad C. Mount, Esquire, and Charles V. Wheeler, Esquire, of counsel of Oklahoma City, Oklahoma, attorneys for plaintiff.

Clair J. Killoran, Esquire, and Courtney H. Cummings, Esquire, of the firm of Killoran and Van Brunt, Wilmington, Delaware, and Willis Witt, Esquire, of the firm of Liddell, Austin, Dawson & Sapp, of counsel, Houston, Texas, attorneys for defendant.

CHRISTIE, J.

This is an action by Cities Service Gas Company, an interstate pipeline company, against Western Natural Gas Company, a producer of natural gas, to recover alleged overpayments for natural gas purchased by Cities from Western from January 1, 1954 to January 1, 1958.

The case was filed in 1958. It is one of many cases filed after the United States Supreme Court declared invalid the attempt of the State of Kansas to regulate prices received by natural gas producers.

The jurisdiction of this Court to hear "natural gas rebate cases" similar to this case was litigated in this Court, the Delaware Supreme Court and the United States Supreme Court. *Cities Service Gas Co.* v. *Columbian Fuel Corp.*, 2 Storey 262, 155 A. 2d 879 (Super. Ct. 1959); *Columbian Fuel Corporation and Pan-American Petroleum*

Corp. v. *Superior Court,* 2 Storey 365, 158 A. 2d 478 (1960); Aff'd 366 U.S. 656, 81 S. Ct. 1303 (1961).

Meanwhile cross motions for summary judgment and defendant's motion to dismiss were argued in this Court. By unreported memorandum of decision dated May 24, 1960, plaintiff's motion for summary judgment was granted and defendant's motions were denied. Western appealed to the Delaware Supreme Court which reversed upon the ground that the summary judgment in favor of plaintiff entered in Superior Court must have rested upon a finding of business duress and there was no showing that such duress existed. *Western Natural Gas Company* v. *Cities Service Gas Company,* .... Storey ....., 201 A. 2d 164 (1964). It was ordered that the case be returned to the Superior Court for further proceedings. Although Western prevailed in the Delaware Supreme Court, it sought certiorari in the United States Supreme Court because certain rulings by the State Courts as to the gas rates filed with the Federal Power Commission eliminated one of the defenses urged by Western. Certiorari was denied. 379 U.S. 905, 85 S. Ct. 189 (1964).

The ruling of this Court which was reversed was based upon the record made in respect to plaintiff's contentions that refunds were due under the equitable doctrines of restitution and unjust enrichment. This Court and the Supreme Court declined to consider or pass upon plaintiff's alternative theory that there was a contract to refund. Plaintiff has now moved for summary judgment upon its contract theory of recovery.

I will not repeat in any detail the background facts which appear in some of the opinions already cited. The basic facts upon which plaintiff relies to establish a right to recover under a contract to refund are undisputed.

Defendant, Western, is a producer of natural gas in the Kansas-Hugoton Field and is subject to the jurisdiction of the Federal Power Commission as a natural gas company within the meaning of the Natural Gas Act, 15 U.S.C. § 717. Defendant sells the natural gas to plaintiff, Cities, in interstate commerce for resale to others by plaintiff.

On September 29, 1949, plaintiff and defendant entered into a fixed price contract under which plaintiff agreed to purchase natural gas produced by defendant from the Hugoton Field in Kansas at a price of 8¢ per thousand cubic feet (Mcf).

On December 2, 1953, the Corporation Commission of the State of Kansas promulgated its Minimum Price Order fixing a minimum price of 11¢ per Mcf to be paid for natural gas produced from the Kansas-Hugoton Field, effective January 1, 1954. The ordered price was substantially in excess of the 8¢ price fixed in the Gas Purchase Contract between the parties.

Plaintiff immediately filed suit in the Kansas courts challenging the validity of the Order.

On January 21, 1954, before any payments as to which refunds are claimed were made, plaintiff sent (and within a day or two thereafter, defendant received) a letter which read as follows:

> "The State Corporation Commission of the State of Kansas by Order dated December 2, 1953, in Docket No. 44099-C (C-3216) directed that on and after January 1, 1954, as a condition precedent for withdrawal of gas from the Hugoton Gas Field in Kansas, there shall be paid therefor or attributed thereto, at the wellhead, a minimum price of not less than eleven cents (11¢) per Mcf (14.65 pounds p.s.i.a.).

"Cities Service Gas Company and certain other parties filed petitions in the District Court of Finney County, Kansas, for a judicial review of the said Order.

"Pending final judicial determination of the said Order and beginning January 1, 1954, Cities Service Gas Company intends to pay for all gas purchased by it in the Kansas-Hugoton Field in strict compliance with the terms and conditions of the said Order. Such compliance with said Order by this Company, however, is made to avoid the penalities provided by the Kansas statutes for a violation thereof, and the payments made to you in compliance with said Order pending its final judicial determination are to be considered and accepted by you as involuntary payments on our part, without prejudice to our rights in said litigation, and in no event as an acquiescence by us in the validity of said Order.

"In the event the said Order is finally judicially modified or declared to be invalid in whole or in part, as a result of which you have been overpaid for gas purchased during the interim aforesaid, Cities Service Gas Company will expect you to refund to it the amount of said overpayments."

Thereafter each check sent to defendant by plaintiff had a voucher attached thereto which recited that payment was made subject to the provisions of the letter of January 21, 1954. Defendant accepted and cashed the checks.

In 1956, the Supreme Court of Kansas sustained the validity of the Kansas Minimum Price Order *Cities Service Gas Co.* v. *State Corporation Commission,* 180 Kan. 454, 304 P. 2d 528 (1956), but on appeal the Supreme Court of the United States on January 20, 1958, reversed 355 U.S. 391, 78 S. Ct. 381, 2 L. Ed. 2d 355, citing *Phillips Petroleum Co.* v. *State of Wisconsin,* 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794 (1954), and *Natural Gas Pipeline Co.* v. *Panoma Corp.,* 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576 (1955).

Following the January 20, 1958, decision of the United States Supreme Court, Plaintiff resumed payments for gas purchased from defendant at the contract price of 8¢ per Mcf and made demand upon defendant for refund of the difference between the contract price and the amount paid for gas at the 11¢ price fixed in the void Order. Upon defendant's refusal to make refund, plaintiff commenced this action to recover the overpayments and lawful interest thereon.

I am of the opinion that under all the circumstances plaintiff's letter of January 21, 1954, constituted an offer and that defendant's acceptance of the funds transmitted by checks with the written reference to such letter attached thereto constituted an acceptance of the offer.

Numerous cases arising from factual situations strikingly similar to those here present have resulted in judgments for those seeking such refunds. Most of these decisions rest upon the theory of restitution and not upon an express contract to refund. Two cases, however, resulted in judgments for the plaintiff on a contract theory.

Upon evidence which corresponds in many respects to the facts in this case, the Court of Appeals for the Tenth Circuit, in *Landon* v. *Northern Natural Gas Co.*, 338 F. 2d 17 (10th Cir., 1964), held that the offer made in the letter and the acceptance of the checks tendered subject to the letter constituted a contract to refund. The Court stated:

> "The record supports the finding of the trial court that the refund letters together with the acceptance and endorsement of the gas payment checks constituted a refund contract. Appellant at no time prior to his answer filed herein objected or excepted in any manner to the letters or checks, nor suggested any other basis." (338 F. 2d at 19).

The decision of the Court of Appeals affirmed the trial court whose opinion is reported as *Northern Natural Gas Co.* v. *Landon,* 212 F. Supp. 856 (D.C. Kan. 1961). There the Court held:

> "We now come to the question as to whether a contract for refund existed between Northern and Landon. The United States District Court for the Northern District of Oklahoma has recently ruled on this question. Almost identical facts were there present as in the present case. The court held a letter to defendant, stating that the eleven-cent payment was to be made under protest, was an offer to pay on condition of refund. Also, that the acceptance of the checks by defendant with endorsements, similar to the ones in the present case, was acceptance of plaintiff's offer. *Cities Service Gas Co.* v. *United Producing Co.,* Civil No. 4554, N.D. Okla., Dec. 18, 1959.
>
> "The Kansas law, which governs this question, is that an unliquidated debt may be discharged by tender and acceptance of a payment conditioned on complete satisfaction of the debt. *Neely* v. *Thompson,* 68 Kan. 193 75 Pac. 117 (1904). From this authority plaintiff urges that a refund contract can be made by conditioning a payment upon refund in case a certain event happens. An analogous situation is found in *Autographic Register Co.* v. *Philip Hano Co.,* 198 F. 2d 208 (1st Cir. 1952), where royalty payments were made upon condition of refund in the event the patents were adjudicated to be infringements.
>
> "I hold that the letters written by Northern constituted an offer in a contract for refund and that Landon's acceptance of the checks containing reference to the letters was acceptance of the offer. I also hold that the refund contract so arrived at modified and supplemented the original contracts."

The decisions in the *Landon* case are in accord with the decision of the United States District Court for the North-

ern District of Oklahoma in *Cities Service Gas Co.* v. *United Producing Co.*, 212 F. Supp. 116 (D.C. Okla. 1960) in which the Court held:

> "9. Plaintiff's letter, dated January 21, 1954, plaintiff's Exhibit 4, constituted a tender of the minimum price of 11¢ per Mcf upon condition that the difference between the contract price, 7¢ per Mcf, 16.4# psia, and the price paid in compliance with the invalid Kansas Order, be refunded by defendant to plaintiff if and when that Order should be adjudged invalid. The subsequent acceptance by defendant of the monthly payments tendered by voucher check, containing a notation that payment was made subject to the terms of the January 21 letter, constituted an acceptance by defendant of plaintiff's offer to pay upon said condition of refund. Therefore, there is a binding contract between the parties for defendant to make the refund sued for here."

Defendant has pointed to numerous legal and factual differences between this case and the *Landon* and *United* cases. For example, in the *United* case the defendant-producer agreed in further correspondence to make the refunds if the pricing order were set aside and it recognized its obligation to do so by including the letter of January 21st with papers it filed with the FPC. I have considered the differences between the *United* and *Landon* cases and the case before me and recognize that in some respects the cases are distinguishable. I remain of the opinion that a contract to refund exists in the case at bar. I am also of the opinion that such holding is in substantial agreement with the law laid down in the two cited cases.

Other contentions raised by defendant are resolved so as not to be inconsistent with the decison here reached.

Summary judgment will be entered in favor of plaintiff on the merits of the case. If a difference of opinion still

exists between the parties as to a computation of the amount due or as to interest, further proceedings will be scheduled in respect thereto. Counsel for plaintiff is requested to prepare an appropriate order.

ORDER AND FINAL JUDGMENT

AND NOW, to-wit, this 21st day of December, 1965, the plaintiff having on March 12, 1965 filed a Motion for Summary Judgment on Refund Contract, and the matter having been briefed and argued, and the Court having rendered its memorandum decision of December 10, 1965, it is

ORDERED that the plaintiff's Motion for Summary Judgment is granted, and judgment is hereby entered for plaintiff against the defendant for the sum of $1,264,826.89, with simple interest thereon at the rate of six percentum (6%) per annum from January 20, 1958, plus the costs of this action.

AND NOW, to-wit, this 21st day of December,

/s/ Andrew D. Christie
Judge

APPROVED AS TO FORM:

MORRIS, JAMES, HITCHENS & WILLIAMS

By Henry N. Herndon, Jr.
701 Bank of Delaware Building
Wilmington, Delaware
Attorneys for Plaintiff

KILLORAN & VAN BRUNT

By /s/ Courtney H. Cummings, Jr.
801 Bank of Delaware Building
Wilmington, Delaware,
Attorneys for Defendant.

APPENDIX E

(Opinion and Judgment of the Supreme Court of Delaware)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 20, 1966

WESTERN NATURAL GAS COMPANY,,
Defendant Below,
Appellant

vs.

CITIES SERVICE GAS COMPANY,
Plaintiff Below,
Appellee

(October 12, 1966)

WOLCOTT, CHIEF JUSTICE, and CAREY and HERRMANN, JUSTICES, sitting.

Clair John Killoran and Courtney H. Cummings, Jr., of Killoran & Van Brunt, Wilmington, (Liddell, Austin, Dawson & Sapp, Houston, Texas, of counsel) for appellant.

John J. Morris, Jr., Howard L. Williams, and Henry N. Herndon, Jr., of Morris, James, Hitchens & Williams, Wilmington (Charles V. Wheeler, Oklahoma City, Oklahoma, of counsel) for appellee.

CAREY, J.:

The sole issue presented in this appeal from the Superior Court is whether the undisputed evidence in the record justifies the holding that a contract existed between the parties whereby Western Natural Gas Company (Western) is obligated to repay Cities Service Gas Company (Cities) the amount of certain overpayments for natural gas.

Prior to the present appeal, the case was before us upon a different issue, i.e., whether Cities was entitled to recover

the overpayments upon a theory of restitution because they were made under duress or business compulsion. See ..... Storey ....., 201 A. 2d 164. The majority of the Court then held that the record was insufficient to justify summary judgment upon that ground. Although the present contract theory was argued, we declined to pass upon it because the question had not been decided by the Court below and was not raised here until reargument. Following an unsuccessful attempt by Western to have the matter reviewed by the United States Supreme Court, 379 U.S. 905, 85 S. Ct. 189, additional affidavits were filed in Superior Court, after which Cities renewed its motion for summary judgment on the contract theory. That Court ruled in Cities' favor.

Because many of the facts have been set forth in our previous opinion, supra, we will state only those presently pertinent. The parties, prior to January 1st, 1954, were bound by a contract whereby Western supplied natural gas to Cities from the Hugoton Field at a price of 8¢ per thousand cubic feet. That contract was subject to all "valid orders, rules and regulations of any regulatory body having jurisdiction". Effective as of that date, the Corporation Commission of Kansas promulgated an order setting a minimum price of 11¢ per M.C.F. for gas produced from the Hugoton Field. Cities immediately filed suit challenging the validity of that order and was ultimately successful in having it declared invalid. Cities Service Gas Company v. State Corporation Commission, 355 U.S. 391, 78 S. Ct. 381.

On January 21st, 1954, before making any payments at the 11¢ rate, Cities wrote the following letter to Western:

> "The State Corporation Commission of the State of Kansas by Order dated December 2, 1953, in Docket No. 44099-C (C-3216) directed that on and after January 1, 1954, as a condition precedent for withdrawal of gas

from the Hugoton Gas Field in Kansas, there shall be paid therefor or attributed thereto, at the wellhead, a minimum price of not less than eleven cents (11¢) per M.c.f. (14.65 pounds p.s.i.a.).

"Cities Service Gas Company and certain other parties filed Petitions in the District Court of Finney County, Kansas, for a judicial review of the said Order.

"Pending final judicial determination of the said Order and beginning January 1, 1954, Cities Service Gas Company intends to pay for all gas purchased by it in the Kansas Hugoton Field in strict compliance with the terms and conditions of the said Order. Such compliance with said Order by this Company, however, is made to avoid the penalties provided by the Kansas statutes for a violation thereof, and the payments made to you in compliance with said Order pending its final judicial determination are to be considered and accepted by you as involuntary payments on our part, without prejudice to our rights in said litigation, and in no event as an acquiescence by us in the validity of said Order.

"In the event the said Order is finally judicially modified or declared to be invalid in whole or in part, as a result of which you have been overpaid for gas purchased during the interim aforesaid, Cities Service Gas Company will expect you to refund to it the amount of said overpayments."

Thereafter, payments by Cities were made at the rate of 11¢ by monthly checks which were received and cashed by Western without comment. To each check was attached a voucher which contained a statement that the payment was made subject to the provisions of the letter of January 21, 1954.

After the decision in Cities Service Gas Company v. State Corporation Commission, supra, was handed down in January 1958, Cities resumed making payments at the 8¢ rate,

and demanded the refund of the "excess" which it now seeks to recover in this action.

Cities presently relies upon the theory that the letter of January 21st, 1954 constituted an offer which was accepted by the receipt and cashing of the checks, whereby a contract, or a modification of the original contract, was created under which Western agreed to repay the excess if and when the Kansas Order was found invalid. The Court below accepted that theory.

Western denies that any refund contract was created. It argues that the letter of January 21, 1954 was nothing more than a statement by Cities of its intent to pay the 11¢ rate; that its language was inadequate to put Western on notice of any intent to make an offer or to call upon Western to agree or disagree; that the language on the check vouchers was insufficient to bind Western in any way; and that prior and subsequent conduct of the parties demonstrates the lack of an intent by either party to create a refund contract.

Cities cites two cases which it contends involved the same factual situation; Western contends that they are basically different and in fact lend no aid to Cities. Those cases are Cities Service Gas Company v. United Producing Company, 212 F. Supp. 116, and Northern Natural Gas Company v. Landon, 212 F. Supp. 856, affd. 338 F. 2d 17, cert. den. 381 U. S. 914, 85 S. Ct. 1529. Both of them were suits for refunds of alleged overpayments made because of the same price order of the Kansas Corporation Commission. We pause to examine them.

In the United case, Cities wrote to United exactly the same letter on the same date as the one written to Western. Shortly thereafter United suggested a modification which was refused by Cities, whereupon United accepted the

terms originally proposed with a minor change* which Cities apparently did not accept. Cities then proceeded to make payments by voucher checks precisely like those sent to Western, the vouchers referring to Cities original letter of January 21, 1954. The Court made this finding:

> "Plaintiff's letter dated January 21, 1954, plaintiff's Exhibit 4, constituted a tender of the minimum price of 11¢ per Mcf upon condition that the difference between the contract price, 7¢ per Mcf, 16.4# psia, and the price paid in compliance with the invalid Kansas Order, be refunded by defendant to plaintiff if and when that Order should be adjudged invalid. The subsequent acceptance by defendant of the monthly payments tendered by voucher check, containing a notation that payment was made subject to the terms of the January 21 letter, constituted an acceptance by defendant of plaintiff's offer to pay upon said condition of refund. Therefore, there is a binding contract between the parties for defendant to make the refund sued for here."

Western contends that the United decision is not persuasive here because United in fact treated Cities' letter as an offer which it accepted, whereas Western did not consider it to be an offer and did not accept it. It will be noted, however, that the Court's finding made no mention of United's letters but expressly based its conclusion of acceptance upon the original letter and the acceptance of the voucher checks. We cannot surmise that this was an oversight on the Court's part; the finding may be explainable by the fact that United's last letter contained a variation (although minor) from the terms stated originally by Cities. Through

---

* The suggested change was this: "In the event, however, any of your other suppliers of gas in the Kansas Hugoton Field are granted any limitation or qualification with respect to their obligation to make such refund, United Producing Company, Inc. will expect its obligation with respect thereto to be relaxed to the same extent".

the vouchers, Cities indicated reliance upon its original proposition. As we analyze the opinion and that part of the record which is before us, the facts in the Western case are substantially the same as the present one with respect to the creation of the refund contract.

In the Landon case, the situation was not precisely the same. Northern wrote to Landon on February 23, 1954 that it would pay the 11¢ rate "upon the condition that you will refund . . . the entire amount of the increase" if the Kansas Order should be determined invalid. Its payments after the first letter were by checks which bore an endorsement that they were "accepted subject to conditions of the 2/23/54 letter". Landon accepted those checks without question. The trial Court found the existence of a contract to refund.

Western now suggests that Landon made no real issue about the existence of a refund contract, but claimed that it was actually an agreement to refund only the excess over a prior Kansas rate order of 8¢ rather than the lower rates of the original contract. This suggestion is not in harmony with the opinion of either the trial or appellate Court in the Landon case. The District Court did not mention the 8¢ rate; the reason for that silence appears in the Appellate Court opinion, wherein it is pointed out that the original answer denied the existence of any refund contract and that the matter of rates was not brought into the case until about a month after the District Court's decision — some two years after the original answer. The lower Court refused to permit the amendment because of its lateness. Clearly, the creation of the refund contract was specifically found and affirmed on appeal. There is a difference, of course, in the language used by Northern in both its letter and the endorsements on its checks from that used by Cities, but we think the real meaning is the same. The mere fact that Northern placed the endorsements on the checks them-

selves rather than on attached vouchers is of no significance; no rights of third-party holders are involved.

To determine the existence or non-existence of a contract, we may consider the circumstances surrounding the transaction and what the parties said and did. McCormick on Evidence § 219. The letter of January, 1954 does not say in so many words that Cities was thereby making an offer to pay the increased price on condition that Western agree to refund the excess if the regulation should be held void. It is difficult, however, to believe that it could reasonably be understood to mean anything else. Neither party then knew whether the Kansas order was binding. Neither party knew how long a period would be required to obtain a final ruling and thus find out which price was controlling. If the regulation was valid, the only lawful price was 11¢; if it was not valid, the contract price remained at 8¢. Cities expressed its belief that the regulation was invalid, but apparently Western thought otherwise. Both parties must have realized that many thousands of dollars would be involved; the ultimate excess allegedly totaled over one and a quarter millions excluding interest, or almost $30,000 per month. It is not realistic to think that Cities intended its letter to mean that it was voluntarily going to pay the increased price, notwithstanding its expressed belief in its invalidity and notwithstanding its suit to have it declared so, with nothing more than the hope that Western would repay it if Cities prevailed in its suit. Cities said, in effect, that it was afraid of criminal sanctions (a fear which later proved groundless), that the payments were involuntary and that it would "expect" reimbursement from Western if the contingency happened. The word "expect" is frequently used to mean more than "hope" or "anticipation"; one acceptable definition found in Webster's Third New International Dictionary is to "consider (a person) obli-

gated or in duty bound, as in the expression 'England expects every man to do his duty' ". A definition of the word given in Funk & Wagnalls Dictionary is "to count upon as right and due; rely upon; require". This meaning has been accepted in a number of cases, depending upon the context and the surrounding circumstances. Sillman v. Spokane Savings & Loan Soc., 175 P. 296; Orr v. State, 111 Southern 2d. 627; Wattjis v. Faeth, 40 N. E. 2d. 521, Holcomb v. Holcomb, 159 So. 564; Osborne v. McWilliams Dredging Co., 176 So. 410.

In the light of the circumstances and the position in which the parties found themselves at the time, we think the only reasonable interpretation of Cities' letter is that it was an offer to pay the increase upon the condition of a refund if the regulation should be found invalid. Acceptance of the payments without protest or objection was an acceptance of the offer.

After this case was remanded to the Superior Court, considerable additional material was brought into the record through affidavits. Western contends that the Court erred in granting summary judgment on the ground that these affidavits demonstrated the existence of disputed material facts. It suggests that a jury could find from the evidence a lack of any intent on Western's part to enter into any contract to refund. We have examined the affidavits and find nothing therein to prevent summary judgment. Western's subjective intent is not controlling. 1 Williston on Contracts (3d. ed.) Ch. 2 & 3; 9 Wigmore on Evidence (3d. ed.) § 2413; Restatement of Contracts § 71; 17 C. J. S. 640.

In Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976, Judge Learned Hand had this to say:

"All the attendant facts constituting the setting of

> a contract are admissible, so long as they are helpful; the extent of their assistance depends upon the different meanings which the language itself will let in. Hence we may say, truly perhaps, that, if the language is not ambiguous, no evidence is admissible, meaning no more than that it could not control the sense, if we did let it in; indeed, it might 'contradict' the contract — that is, the actual words should be remembered to have a higher probative value, when explicit, than can safely be drawn by inference from surroundings. Yet as all language will bear some different meanings, some evidence is always admissible; the line of exclusion depends on how far the words will stretch, and how alien is the intent they are asked to include".

Similar views are expressed in 9 Wigmore on Evidence (3d. ed.) § 2466. Having found what we consider to be the only reasonable meaning of Cities' letter, any other evidence of attendant facts and circumstances becomes unnecessary and therefore inadmissible.

Finally, Western suggests that there was no consideration for a contract and that it lacks mutuality. We cannot agree. Cities for the time being gave up its right to litigate the rate question as against Western and agreed to make the higher payments pending the outcome of its litigation. That detriment not only furnished sufficient consideration for Western's promise to refund, see Autographic Register v. Phillip Hano Co., 198 F. 2d. 208; it also provided the necessary mutuality. 70 C.J.S. 349.

The judgment below must be affirmed.

Mandate

THE SUPREME COURT OF THE STATE OF DELAWARE

To the Honorable the Judges of The Superior Court of the state of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

CITIES SERVICE GAS COMPANY

v.

WESTERN NATURAL GAS COMPANY

No. 674 C.A. 1958

a certain judgment or order was entered on the 21st day of December, 1965, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on October 13, 1966, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed.

WITNESS the Honorable Daniel F. Wolcott, our Chief Justice, at Dover, the first day of January, A.D. 1966.

/s/ T. E. TOWNSEND, JR.
Clerk of the Supreme Court.

Issued November 1, 1966